(Slip Opinion)

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Steeltech, Limited	)	EPCRA Appeal No. 98-6
	)	
Docket No. EPCRA-037-94	)	

[Decided August 26, 1999]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

STEELTECH, LIMITED

EPCRA Appeal No. 98-6

FINAL DECISION

Decided August 26, 1999

Syllabus

This is an appeal by Steeltech, Limited ("Steeltech") from an Initial Decision, dated May 27, 1998, issued by Chief Administrative Law Judge Susan L. Biro (the "Presiding Officer"). This matter arises out of an administrative enforcement action by the United States Environmental Protection Agency Region V (the "Region") against Steeltech for alleged violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"). By the Initial Decision, the Presiding Officer determined that Steeltech is liable for nine violations of the reporting requirements of EPCRA § 313, and the Presiding Officer assessed a civil penalty of $61,736 for these violations. The Presiding officer based her penalty analysis on the guidance of an Agency penalty policy, the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act" (Aug. 10, 1992) (the "ERP").

Steeltech is a corporation that owns a manufacturing facility in Grand Rapids Michigan (the "Facility"). At the Facility, Steeltech used nickel and chromium during calendar years 1989, 1990 and 1992 and, in 1993, used nickel, chromium and cobalt. Nickel, chromium and cobalt are subject to the reporting requirements of EPCRA, which requires manufacturers to file Toxic Chemical Release Inventory Reporting Forms ("Form Rs") reporting their use of certain toxic chemicals. The Form Rs must be filed with the EPA no later than July 1 following the calendar year in which the use of the toxic chemicals exceeded the applicable reporting thresholds. On appeal, Steeltech has admitted that it failed to file the requisite Form Rs and is liable for nine violations of EPCRA § 313; the only issues raised go to the amount of penalty to be assessed for these violations.

Steeltech raises essentially two general arguments on appeal. Steeltech argues that the Presiding Officer erred by applying the "formulaic restrictions of the [ERP]" in determining the amount of the penalty and in requiring a showing of "extraordinary circumstances" as a basis for departing from the ERP. Steeltech also argues that, even under the guidance of the ERP, the Presiding Officer erred by failing to grant further reductions to the penalty.

HELD: 1) Although it is not necessary to show "extraordinary circumstances" to justify departing from the ERP, it is appropriate to apply the ERP to the facts of this case and the circumstances do not warrant a deviation from the ERP's guidance. In particular, the following circumstances of this case do not warrant deviation from the ERP: (a) Steeltech's alleged lack of awareness of the EPCRA filing requirements; (b) Steeltech's alleged strained financial condition; and (c) alleged lack of actual harm to the environment. In addition, the guidance of another Agency policy applicable to penalties assessed in settlements ("Incentives for Self-policing: Discovery, Disclosure, Correction, and Prevention of Violations," 60 Fed. Reg. 66,706 (Dec. 22, 1995)) does not provide a basis for departing from the guidance of the ERP in this litigated case.

2) Steeltech has failed to show any clear error in the Presiding Officer's application of the ERP's guidance. In particular, Steeltech has failed to show clear error in the Presiding Officer's decision regarding the amount of penalty reductions to grant for (a) Steeltech's voluntary disclosure of the 1992 and 1993 violations, and (b) Steeltech's favorable "attitude." Steeltech also has failed to show circumstances that would warrant a penalty reduction under the ERP's guidance for "other factors as justice may require."

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

This is an appeal by Steeltech, Limited ("Steeltech") from an Initial Decision, dated May 27, 1998, and from an Order Denying Motion to Reopen Hearing, dated August 14, 1998, entered by Chief Administrative Law Judge Susan L. Biro (the "Presiding Officer"). This matter arises out of an administrative enforcement action by the United

States Environmental Protection Agency Region V (the "Region") against Steeltech for nine alleged violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. By the Initial Decision, the Presiding Officer determined that Steeltech is liable for nine violations of the reporting requirements of EPCRA § 313, and the Presiding Officer assessed a civil penalty of $61,736 for these violations.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

"EPCRA § 313 requires certain facilities to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds." *In re Catalina Yachts, Inc.*, EPCRA Appeal Nos. 98-2 & 98-5, slip op. at 4 (EAB, Mar. 24, 1999), 8 E.A.D. __ (footnote omitted) (citing *In re Spang & Co.*, 6 E.A.D. 226, 228 (EAB 1995); *In re K.O. Mfg., Inc.*, 5 E.A.D. 798, 799-800 (EAB 1995)). The reporting threshold relevant to this case is 25,000 pounds of a toxic chemical used at a facility in a calendar year. EPCRA § 313(f)(1)(B)(iii); 40 C.F.R. § 372.25(a). The Agency has the authority to enforce the reporting requirements of section 313 and, at the time of the violations at issue here, was authorized to impose civil penalties of up to $ 25,000[1] for each failure to file a Form R and for each day that the violation continued. EPCRA § 325(c), 42 U.S.C. § 11045(c).

[1]Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted directing the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. The Agency has published inflation adjusted maximum penalties at 40 C.F.R. pt. 19.

B. *Factual and Procedural Background*

Steeltech is a corporation that, at all relevant times, had a place of business located at 1252 Phillips Avenue, S.W., Grand Rapids, Michigan (the "Facility"). During the relevant calendar years of 1989 through 1993, Steeltech used nickel, chromium, and cobalt in the manufacture of alloy castings at the Facility. Steeltech used nickel, chromium and cobalt in the following amounts in the indicated calendar years:

1989	Nickel	351,625 lbs.
	Chromium	256,238 lbs.
1990	Nickel	285,890 lbs.
	Chromium	208,335 lbs.
1992	Nickel	283,901 lbs.
	Chromium	189,268 lbs.
1993	Nickel	347,923 lbs.
	Chromium	231,955 lbs.
	Cobalt	162,369 lbs.

Joint Stipulated Facts (Ex 26) ("Stipulations") ¶¶ 15, 17, 22, 26, 31, 33, 39, 42, 48, 51, 54. Nickel, chromium and cobalt are subject to the reporting requirements of EPCRA. EPCRA § 313(c); 40 C.F.R. § 372.65; *see also* Stipulations ¶¶ 9, 10, 11. However, Steeltech did not timely file the required Form Rs reporting its use of nickel, chromium and cobalt in calendar years 1989, 1990, 1992 and 1993. Stipulations ¶¶ 16, 18, 23, 27, 32, 34, 41, 44, 50, 56. As noted above, Steeltech's Form Rs were required to be filed no later than July 1 following the calendar year in which Steeltech's use of these toxic chemicals exceeded the reporting threshold of 25,000 lbs. *Catalina Yachts,* slip op. at 4, 8 E.A.D. __.

On February 12, 1992, an EPA representative conducted an inspection of the Facility to determine whether Steeltech was in compliance with the EPCRA. Stipulations ¶ 12. Based on that inspection, the Region filed the complaint commencing this matter on September 2, 1994 (the "Complaint"). The Complaint originally alleged four violations for the years 1989 and 1990 (a separate violation was alleged for the failure to file a Form R for each of nickel and chromium in each year).[2] Subsequently, the Region was granted permission to amend the Complaint to allege five additional violations for the years 1992 and 1993 (a separate violation for each of nickel and chromium in 1992 and 1993 and for cobalt in 1993) (the "Amended Complaint"). The parties stipulated that the five violations for 1992 and 1993 had been "voluntarily disclosed" by Steeltech. Stipulations ¶¶ 40, 43, 49, 52, 55.

The Region requested a total penalty of $74,390 for the nine Form R reporting violations alleged to have occurred for calendar years 1989, 1990, 1992 and 1993.[3] The Region's proposed penalty was calculated based upon the guidelines of the Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act (August 10, 1992) (the "ERP"), which was prepared by the Agency's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances.[4]

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[2]The Complaint also originally alleged two violations for calendar year 1988. However, the Region subsequently abandoned its claims with respect to calendar year 1988 based on statute of limitations considerations, and those claims were formally dismissed by Order dated December 3, 1997.

[3]The Region's final penalty request was stated in its post-hearing brief (after it abandoned its request for a finding of the two violations for calendar year 1988 as noted *supra* note 2).

[4]The stated purpose of the ERP is to "ensure that enforcement actions for violations of EPCRA § 313 * * * are arrived at in a fair, uniform and consistent manner;

(continued...)

Steeltech filed answers to both the Complaint and the Amended Complaint alleging, among other things, lack of knowledge or information sufficient to form a belief as to the truth of the allegations as to liability and also raising certain affirmative defenses. Steeltech also requested a hearing. On April 6, 1995, Michael F. Farmer, the former owner of Steeltech, was granted leave to intervene in this action. Mr. Farmer's intervention was based on the fact that, when he sold his stock in Steeltech to its present owners in July 1990, he had entered into an indemnification agreement covering certain environmental liabilities.[5]

In July 1997, the Region filed a motion for accelerated decision as to both liability and penalty on all counts of the Amended Complaint. Both Steeltech and Mr. Farmer filed oppositions to that motion. In August 1997, the Presiding Officer entered an order granting accelerated decision as to liability for the nine Form R reporting violations alleged for calendar years 1989, 1990, 1992, and 1993.[6] The Presiding Officer did not grant accelerated decision as to the amount of the penalty for the nine violations, but instead scheduled an evidentiary hearing, which was held on September 23, 1997. At the hearing, the parties stipulated to the admission into evidence of twenty-three exhibits, including a stipulation of agreed facts. The ERP and the Region's penalty calculation work-sheets showing how the Region arrived at its proposed penalty were among the exhibits admitted into evidence (Exs. 2 and 3, respectively). In addition, testimony was heard from Mr. Farmer and two

[4](...continued)
that the enforcement response is appropriate for the violations committed; and that persons will be deterred from committing EPCRA § 313 violations." ERP at 1.

[5]The stock of Steeltech was transferred from Mr. Farmer to Gary Salerno and Armand Salerno on July 31, 1990. Stipulations ¶ 2.

[6]For ease of reference and consistency with both the Initial Decision and the parties' briefs, we will identify the violations by reference to the calendar year in which the toxic chemicals were used, rather than the year in which the Form R disclosing that usage was required to be filed.

representatives of Steeltech: (1) James Pews, Steeltech's chief financial officer and vice president of finance; and (2) Gary Salerno, one of the owners of Steeltech. The Region did not call any witnesses to testify on its behalf at the hearing.

After the conclusion of the evidentiary hearing and after consideration of the parties' post-hearing briefs, the Presiding Officer entered the Initial Decision assessing a total penalty of $61,736 for Steeltech's nine violations of EPCRA's Form R reporting requirements. Although the Presiding Officer's penalty assessment is lower than the penalty of $74,390 proposed by the Region, the Presiding Officer's analysis also followed the guidelines of the ERP. The Presiding Officer disagreed with the Region's proposed penalty with respect to two discretionary adjustments to the gravity-based penalty amount. (The guidelines of the ERP provide first for the calculation of a gravity-based penalty, taking into account factors relating to the seriousness of the violation and the size of respondent's business, and then for adjustments to be made based upon mitigating and/or aggravating circumstances of the particular case.)[7]

First, the Presiding Officer decided to grant a 20% reduction in the gravity component of the penalty for the four violations for years 1989 and 1990 to take into account evidence of Steeltech's cooperative attitude in connection with the inspection of its facility in February 1992.[8] The Region's proposed penalty did not include this reduction.

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[7]For a more detailed description of the ERP's guidance, see *In re Clarksburg Casket Co.,* EPCRA Appeal No. 98-8, slip op. at 22 n.22, 23 n.23 (EAB, July 16, 1999), 8 E.A.D. __; *In re Woodcrest Mfg., Inc.,* EPCRA Appeal No. 97-2, slip op. at 23-31 (EAB, July 23, 1998), 7 E.A.D. __; *In re Pacific Refining Co.,* 5 E.A.D. 607, 612-22 (EAB 1994).

[8]The unadjusted gravity-based penalty for these four violations totaled $50,288. After granting a 20% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $40,231 (with fractions rounded to the nearest whole dollar amount) for the four violations in 1989 and 1990. Initial Decision at 22.

Second, the Presiding Officer decided to grant Steeltech a larger penalty reduction than had been proposed by the Region for Steeltech's voluntary disclosure of the five violations for the 1992 and 1993. The Region's proposed penalty rationale included a 35% penalty reduction for the 1992 and 1993 violations, with 25% of the reduction on account of Steeltech's voluntary disclosure of the violations and 10% for Steeltech's prompt correction of the violations by filing the required Form Rs. In contrast, the Presiding Officer determined to reduce the gravity-based penalty for the 1992 and 1993 violations by 42%.[9] In arriving at this reduction, the Presiding Officer first observed that, under the ERP's guidance, reductions of up to 50% may be granted for "voluntary disclosure," with the initial 25% of this reduction available for facilities that both voluntarily disclose *and* promptly correct the violations by filing the requisite Form Rs. *See* ERP at 14. The Presiding Officer also observed that there were three criteria relevant to this case[10] for determining whether the second 25% reduction, or a portion thereof, may be granted. These criteria are whether the disclosure is made promptly after the facility discovers the violation, whether the facility takes action to prevent future violations, and whether the facility does not have a history of prior violations. *See id.* at 15. After reviewing these aspects of the ERP's guidance, the Presiding Officer decided to grant Steeltech the 42% penalty reduction, consisting of the initial 25% for Steeltech's voluntary disclosure and prompt remediation of the violations, and an additional 17% for Steeltech's prompt disclosure after discovering the violations and its efforts to prevent future violations. Initial Decision

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[9]The unadjusted gravity-based penalty for these five violations totaled $37,079. The Region's proposed penalties for these five violations, with the proposed 35% adjustment to the gravity-based penalty, totaled $24,101. *See* Complainant's Post Hearing Brief at 24-31. After granting a 42% reduction to the gravity-based penalty, the Presiding Officer assessed penalties of $21,505 for these five violations. Initial Decision at 22-23 (the Presiding Officer appears to have rounded to the whole dollar amount on a violation-by-violation basis).

[10]The ERP contains a fourth criterion applicable only to "supplier notification violations," which is not relevant to this case. ERP at 15.

at 15-16.[11] In all other respects, the Presiding Officer agreed with the Region's analysis, explaining her reasons in a detailed discussion comprising the majority of the 23 page Initial Decision.

After the Presiding Officer entered the Initial Decision, Steeltech filed a motion (the "Motion to Reopen") seeking to have the hearing reopened pursuant to 40 C.F.R. § 22.28(a) on the alleged grounds that the Presiding Officer misunderstood the facts relevant to Steeltech's voluntary disclosure. Steeltech argued that an opportunity should be granted for submission of additional evidence, which Steeltech stated would show that it should be granted an even larger reduction for voluntary disclosure. The Region filed an opposition to Steeltech's Motion to Reopen. On August 14, 1998, the Presiding Officer entered an order denying the Motion to Reopen, explaining that because her reason for not granting a larger reduction was based on Steeltech's history of prior violations, the proffered evidence, which only related to the voluntariness of the disclosure, would not change her penalty analysis. *See* Order Denying Motion to Reopen Hearing at 4-5.

Steeltech now has filed its notice of appeal from both the Initial Decision and the order denying the Motion to Reopen. *See* Brief in Support of Respondent's Appeal of Initial Decision ("Steeltech's Brief") at 2. Steeltech raises essentially two general arguments on appeal: (1) Steeltech argues that the Presiding Officer erred by applying the "formulaic restrictions of the [ERP]," *id.* at 11-19; and (2) it argues further that, even under the guidance of the ERP, the Presiding Officer erred by failing to grant further reductions to the penalty. *Id.* at 20-28.[12]

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[11] The Region has not filed an appeal seeking reversal or other modification of the Presiding Officer's decision granting these more generous penalty reductions.

[12] In a third section of its Brief, Steeltech restates its arguments regarding its second appeal issue focusing specifically on the denial of the Motion to Reopen, which Steeltech contends was in error. Steeltech's Brief at 28-29. Because Steeltech's arguments in the second and third sections of its Brief are redundant, we will address (continued...)

The Region filed a reply brief in opposition to Steeltech's appeal. *See* Brief of Appellee ("Region's Brief"). For the following reasons, we reject Steeltech's arguments and affirm the Presiding Officer's penalty assessment.

II. *DISCUSSION*

A. *The Presiding Officer Did Not Err by Relying Upon the ERP in Formulating Her Penalty Analysis*

As its first argument on appeal, Steeltech contends that the Presiding Officer should have determined the penalty in this case without applying what Steeltech refers to as the "formulaic restrictions" of the ERP. Steeltech's Brief at 11. Noting that the ERP is not a rule and, therefore, does not have the force of law, *id.,* Steeltech argues that the Presiding Officer applied an inappropriately stringent standard for determining whether she would deviate from the guidance of the ERP. *Id*. at 13. In particular, quoting the Initial Decision, Steeltech argues that the Presiding Officer erroneously stated that "extraordinary circumstances" must exist to justify deviation from the ERP's guidelines. *Id*. Steeltech further argues that the appropriate standard, derived from the Board's prior decisions, merely provides that deviation is appropriate where "circumstances warrant." *Id*. (citing *In re DIC Americas, Inc.,* 6 E.A.D. 184, 189 (EAB 1995)). Steeltech then argues that the circumstances in this case do warrant deviation from the ERP. Specifically, Steeltech argues that its violations are not serious and that mitigating circumstances, such as its self-disclosure of the violations, its efforts to avoid future violations, its lack of awareness of the reporting requirements, employee turn-over and financial difficulty, all warrant a low penalty in this case. *Id*.

[12](...continued)
them simultaneously in the second part of our discussion (for the specific discussion of the Motion to Reopen, *see infra* notes 17, 18, 19 and accompanying text).

The Region, in contrast, argues that the Presiding Officer did not err. It argues that the Presiding Officer had the discretionary authority to apply the ERP in this case and properly exercised that authority. The Region explains as follows:

> The fact that she used the term "extraordinary circumstances" does not affect her decision making authority. All she did through this statement was communicate her decision that there were no circumstances which presented a reason to deviate from the ERP in this case.

Region's Brief at 4. The Region also provides responses to the specific circumstances identified by Steeltech as allegedly justifying a departure from the ERP's guidance.

While we agree that a Presiding Officer need not find "extraordinary circumstances" as a basis for deviation from the ERP, we nevertheless reject Steeltech's contention that the circumstances of this case warrant deviation from the guidance of the ERP. We begin our analysis by reviewing the statutory authority for imposing civil penalties, the applicable Agency penalty policy, and our prior decisions applying both the statute and the penalty policy.

As noted above, the statute authorizes the Agency to impose civil penalties of up to $25,000 for each violation of EPCRA § 313. EPCRA § 325(c), 42 U.S.C. § 11045(c). The statute further provides that each day that the failure to report continues is a separate violation. *Id*. Other than these two parameters, the statute does not provide further guidance for the assessment of penalties for violation of EPCRA § 313. Specifically, EPCRA § 325(c), unlike many civil penalty provisions, does not provide a list of factors to be taken into account in assessing civil penalties. *Woodcrest*, slip op. at 21 & n.11, 7 E.A.D. __. The Agency, however, has prepared the ERP to provide guidance on the assessment of penalties for violations of EPCRA § 313. While Steeltech is correct that the ERP has not been promulgated as a regulation and, therefore, does not have the force of law, pursuant to the applicable regulations, the Presiding Officer was required to consider the ERP's guidance. 40 C.F.R. § 22.27(b) (stating that the presiding officer must consider any civil penalty guidelines or policies issued by EPA under the applicable statute). Although required to consider the ERP's guidance, we have stated that "the EPA's adjudicative officers must refrain from treating the [penalty policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based in any case in which those 'basic propositions' are genuinely placed at issue." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 761 (EAB 1997) (citation omitted). Further, "this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *Id.* at 758, citing *DIC Americas*, 6 E.A.D. at 189.

In describing the standard for determining whether to apply the ERP in this case, the Presiding Officer, quoting from the same case relied upon by Steeltech, correctly stated that she had "'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant.'" Initial Decision at 10 (quoting *DIC Americas*, 6 E.A.D. at 189). This Board has considered the guidance of the ERP in many cases. *See, e.g.*, *Woodcrest*, slip op. at 23-31, 7 E.A.D. at ___; *Clarksburg Casket*, slip op. at 22, 8 E.A.D. at ___; *In re Spang & Co.*, 6 E.A.D. 226, 242 n.19 (EAB 1995); *see also In re Pacific Refining Company*, 5 E.A.D. 607, 608 & n.2 (EAB 1994) (comparing the 1992 and 1988 versions of the ERP). We have held generally that "a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination." *In re Great Lakes Div. Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (decided under EPCRA § 104); *accord In re Sandoz, Inc.*, 2 E.A.D. 324, 328 n.11 (CJO 1987). Indeed, "[t]he presiding officer may satisfy his duty of articulating the reasons for his penalty determination by explaining how the facts of the particular case fit the applicable penalty policy." *Great Lakes*, 5 E.A.D. at 374 n.41.

In this case, the Presiding Officer's choice of language in one sentence of her decision implies that she may have applied an inappropriately high standard for deviation from the guidance of the ERP. Specifically, the Presiding Officer stated that "[t]his case presents no *extraordinary circumstances* which would suggest any deviation from the ERP." Initial Decision at 18 (emphasis added).[13] Because the ERP is not a rule, the ERP does not generally restrict the Presiding Officer's discretionary authority and a finding of "extraordinary" circumstances is not required for deviation from the ERP's guidance.[14] Nevertheless, because, as discussed below, we find based on our review of the record that it is appropriate to apply the ERP to these facts and the circumstances do not warrant a deviation from the ERP's guidance, we conclude that the Presiding Officer's reference to "extraordinary circumstances" was not material to the outcome and did not produce a clearly erroneous result.

Steeltech has raised a number of specific circumstances of this case as allegedly warranting deviation from the ERP, none of which we find persuasive. First, we reject Steeltech's argument that its violations were of low gravity due to its lack of awareness of the EPCRA filing requirements. EPCRA is a strict liability statute -- "Congress determined that failure to comply with the reporting requirements of section 313 alone is sufficient for liability and assessment of a civil penalty."

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[13]As noted above, the Presiding Officer correctly observed, at the outset of her analysis when describing the standard for departing from the ERP, that she had "'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant.'" Initial Decision at 10 (quoting *DIC Americas*, 6 E.A.D. at 189). In contrast, her statement regarding "no extraordinary circumstances" appears to be directed not at the standard for departing from the ERP generally, but instead is directed only to the lack of grounds in this case for deviating from the gravity-based penalties assessed under guidelines of the ERP.

[14]As noted above, however, the Presiding Officer is required to consider the ERP and explain her reasons for departing from its guidance. To that extent, the Presiding Officer's discretionary authority is limited by the ERP.

Woodcrest, slip op. at 30, 7 E.A.D. at __. The ERP specifically states that ignorance of the reporting requirements does not justify mitigation of the penalty:

> Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available. In fact, if a violation is knowing or willful, the Agency reserves the right to assess per day penalties, or take other enforcement action as appropriate.

ERP at 14;[15] *accord In re Catalina Yachts, Inc.*, EPCRA Appeal Nos. 98-2 & 98-5, slip op. at 16-17 (EAB, Mar. 24, 1999), 8 E.A.D. __ (upholding a presiding officer's decision not to reduce a penalty on account of respondent's lack of awareness of the reporting requirements). Thus, the ERP's guidance expressly takes into account the circumstances identified by Steeltech. Accordingly, we reject Steeltech's argument that its ignorance of the reporting requirements are circumstances that warrant a departure from the ERP's guidelines.[16]

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[15]This quote shows that, contrary to Steeltech's argument at page 17 of its Brief, the ERP-based penalty is not reserved "for the most recalcitrant violator," but instead is appropriate for the circumstances of this case.

[16]In a closely related argument, Steeltech contends that the Agency is somehow responsible for the violations in that "Steeltech's past non-compliance was a result of never being placed on U.S. EPA's regular mailing list to receive forms and information for the EPCRA program." Steeltech's Brief at 15. This argument is rejected because the Agency is under no statutory or regulatory obligation to ensure that regulated entities receive annual mailings regarding their compliance obligations. *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 631 & n.20 (CJO 1991) (denying request for discovery regarding EPA's practice or policy of sending notices regarding EPCRA § 313 reporting requirements). Any practice of sending notices to regulated entities and omission of the

(continued...)

Steeltech also argues that its failure to timely file the Form Rs for 1992 and 1993 was "the result of circumstances surrounding the * * * efforts to bring Steeltech into a profitable situation." Steeltech's Brief at 13. It states further that it was "teetering on the edge of bankruptcy" and that "[i]t was absolutely critical for [Steeltech's owner] to focus all of his efforts on sales and marketing to bring in revenues to keep the business going." *Id*. at 13-14. We find this argument to be particularly unpersuasive. Compliance with EPCRA, or any other environmental or safety regulation, is not limited only to those businesses that are experiencing no financial strain; environmental and safety regulations are basic requirements of operating any business in this country. *See, e.g., In re Fisher-Calo Chemicals and Solvents Corp.*, 2 E.A.D. 301 (Adm'r 1987) (concluding in a permit proceeding that even a company operating under bankruptcy court protection must continue to comply with the requirements of the Resource Conservation and Recovery Act); *In re Wheeling-Pittsburgh Steel Corp.*, 2 E.A.D. 79 (CJO 1985) (same in a penalty proceeding). Indeed, Steeltech's argument, rather than providing a basis for mitigation, instead suggests that its owners made a calculated decision to focus exclusively on marketing while neglecting as secondary compliance with applicable environmental and safety regulations. That kind of disregard of EPCRA's reporting requirements certainly does not constitute circumstances warranting a downward deviation from the ERP's guidance.

We also reject Steeltech's contention that alleged lack of actual harm to the environment warrants departure from the guidelines of the ERP. Steeltech's Brief at 16. Reporting failures are significant because "the failure to report under the EPCRA deprives local communities, states and the federal government of information needed to inform citizens and the local community about the toxic chemicals used by the violator * * * [t]hat deprivation is inherently harmful." *Woodcrest*, slip

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[16](...continued)
respondent from that mailing list "does not make [the respondent] less culpable and would not justify a reduction in the penalty assessed." *Id.* 3 E.A.D. at 631.

op at 31, 7 E.A.D. at ___. Thus, as we held in *Woodcrest*, "it is appropriate that substantial penalties be imposed even if [a respondent] could prove that there was no actual harm [to the environment or health]." *Id.* slip op. at 30, 7 E.A.D. at ___; *see also Clarksburg Casket*, slip op. at 24-25, 8 E.A.D. at ___.

Finally, we reject Steeltech's contention that guidance from another Agency policy, "Incentives for Self-policing: Discovery, Disclosure, Correction, and Prevention of Violations," 60 Fed. Reg. 66,706 (Dec. 22, 1995), should be used in this case to support a penalty reduction of 75 to 100%. Steeltech's Brief at 18. We have held that the Agency's settlement policies, including specifically the "Self-Disclosure Policy," should not be applied in litigated penalty assessments. *In re Bollman Hat Co.*, EPCRA Appeal No. 98-4, slip op. at 14, 17 (EAB, Feb. 11, 1999), 8 E.A.D. ___ (declining to adopt presiding officer's penalty rationale where that rationale was based in part upon application of the Self-Disclosure Policy in a litigated penalty assessment); *In re Harmon Elec., Inc.*, RCRA (3008) Appeal No. 94-4, slip op. at 60 (EAB, Mar. 24, 1997), 7 E.A.D. __, *rev'd on other grounds*, 19 F.Supp. 2d 988 (W.D. Mo. 1998). Accordingly, the guidance of the Self-Disclosure Policy does not provide a basis for departing from the ERP in this case.

For all of the foregoing reasons, we reject Steeltech's contention that the circumstances of this case warrant a departure from the ERP's guidance and we find no error in the fact that the Presiding Officer used that guidance as a framework to explain her penalty rationale.

B. *Steeltech Has Failed to Show any Clear Error in the Presiding Officer's Application of the ERP Guidance*

As its second issue on appeal, Steeltech argues that if the guidance of the ERP is applied in this case, Steeltech is nevertheless entitled under that guidance to penalty reductions that were not granted by the Presiding Officer. Steeltech identifies three separate categories of penalty reductions that it argues should have been applied in this case.

First, Steeltech argues that it should have been granted a 50% penalty reduction for Steeltech's voluntary disclosure of the 1992 and 1993 violations, rather than the 42% granted by the Presiding Officer. Steeltech's Brief at 20-21. Second, Steeltech argues that, for its favorable "attitude," it should have been granted a 30% penalty reduction for all nine violations, rather than the 20% granted by the Presiding Officer for only the 1989 and 1990 violations. *Id.* at 21-24. (Steeltech's third issue on appeal raising an alleged error in the denial of its Motion to Reopen also relates to this issue and will be discussed in this part of our analysis.) Third, Steeltech argues that it should have been granted a 25% reduction for "other factors as justice may require" in order to take into account the new ownership of Steeltech and Steeltech's alleged "lack of control over the violation," among other circumstances. *Id.* at 24-28. As discussed below, we reject each of these arguments, finding no clear error or abuse of discretion in the Presiding Officer's analysis in applying the ERP's guidance.

1. *Penalty Reductions for Steeltech's Voluntary Disclosure*

The ERP's guidance for "voluntary disclosure" provides for an initial 25% reduction for a violator that, without any prompting from the Agency, voluntarily discloses and promptly corrects its violations by filing the requisite Form Rs, and it provides for an additional reduction of up to 25% where the violator meets certain additional criteria. ERP at 14-15. Here, the Region proposed that the gravity-based penalty for the two 1992 violations and the three 1993 violations be reduced by 35%. The Region proposed that Steeltech should be granted the initial 25% reduction because it voluntarily disclosed the violations and that it should be granted an additional 10% reduction because it promptly filed the missing reports after it disclosed its violations. In contrast, Steeltech argued that it should be granted both the initial 25% reduction and the full amount of the second 25% reduction. Steeltech based its argument upon the parties' stipulations, which stated that Steeltech "voluntarily disclosed" the five violations. Steeltech argued that this language from the parties' stipulations established that it was entitled to the full 50% penalty reduction.

In the Initial Decision, the Presiding Officer questioned whether, under a literal application of the ERP's guidance, Steeltech should even be granted the initial 25% penalty reduction. The Presiding Officer explained as follows:

> At the outset it must be noted that the ERP provides that "the Agency will not consider a facility eligible for any voluntary disclosure reductions if the company has been notified of a scheduled inspection or the inspection has begun." As indicated in detail above, Steeltech did not disclose the 1992 and 1993 violations, until after the 1992 inspection occurred and after the original Complaint was filed, albeit the inspection and original Complaint related only to the 1988 and 1989 violations. However, the testimony of Mr. Pews indicates that Steeltech's "voluntary disclosure" was not spontaneous; rather, it merely consisted of his confirmation to EPA of the accuracy of information concerning the existence of the additional violations, information which EPA had previously provided to him. Nevertheless, Complainant, in its enforcement discretion, chose to consider those violations to have been "voluntarily disclosed" within the meaning of the ERP and Complainant's discretion in this instance will not be disturbed.

Initial Decision at 15 (citations and footnotes omitted). As this quote demonstrates, the Presiding Officer determined to grant Steeltech the benefit of the initial 25% penalty reduction even though the Presiding Officer had questions regarding the appropriateness of that reduction.[17]

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[17]Because Steeltech believed that the Presiding Officer's questioning of the

(continued...)

With respect to the second portion of the voluntary disclosure adjustment, the Presiding Officer disagreed with the Region's analysis. First, the Presiding Officer rejected the Region's rationale for granting a 10% reduction, stating that the Region's proposed reason for the reduction (that Steeltech promptly filed the missing reports) is actually one of the criteria that must be satisfied for eligibility for the initial 25% reduction. Initial Decision at 15-16 (citing ERP at 15). The Presiding Officer, however, decided to grant Steeltech two-thirds of the second 25% reduction because the Presiding Officer concluded that Steeltech satisfied two of the three criteria applicable under the ERP for granting the second part of this penalty reduction. *Id.* at 16. The Presiding Officer determined that Steeltech had promptly disclosed the violations after they were discovered by Steeltech and that it took action to ensure that future violations would not occur. *Id.* The criterion that the Presiding Officer found was not satisfied was that Steeltech had a history of violations. *Id.*

On appeal, Steeltech argues that the Presiding Officer misapplied the history-of-violation criterion. Steeltech first observes that the ERP guidance provides that the violator must not have a history of violations "for the two reporting years preceding 'the *calendar year in which the violation is disclosed to EPA.*'" Steeltech's Brief at 21 (quoting ERP at 15, emphasis added by Steeltech). Second, Steeltech notes that the Presiding Officer, in contrast, found that Steeltech had a history of violations because it "failed to timely file Form Rs for 1990 which is two reporting years preceding the *reporting years* for the

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[17](...continued)
spontaneity of Steeltech's voluntary disclosure was based upon a misunderstanding of both the parties' stipulations and certain hearing testimony, Steeltech filed its Motion to Reopen, seeking to elicit additional testimony to clarify these facts. The Presiding Officer denied that motion stating that the proffered testimony would not change her penalty analysis because she had granted Steeltech the initial 25% reduction in spite of her questions as to Steeltech's spontaneity and that she had based her decision not to grant the full 50% reduction on the unrelated fact that Steeltech had a history of violations, *i.e.*, the 1989 and 1990 violations.

violations." Initial Decision at 16 (emphasis added). After noting the different time periods considered for the history-of-violation criterion under the ERP and in the Presiding Officer's analysis, Steeltech argues that the violation for the 1990 reporting year relied upon by the Presiding Officer is not relevant under the ERP because those violations are four reporting years prior to 1994, the calendar year in which Steeltech disclosed the 1992 and 1993 reporting violations. The Region has responded to this argument by, in essence, contending that Steeltech is simply obscuring the fact that "by 1994 [Steeltech] had never been in compliance with EPCRA section 313 requirements for two consecutive reporting years." Region's Brief at 11 (noting that Steeltech had only timely filed the Form Rs for the 1991 calendar year and that it had violated the reporting requirements in all other years prior to 1994).

We reject Steeltech's argument on appeal regarding the appropriate time period for determining whether it has a history of violations relevant to the voluntary disclosure adjustment factor because it would result in an absurd application of the ERP in this case. In essence, Steeltech is arguing that it did not have a history of violations within the two reporting years preceding the calendar year in which it made its disclosures simply because the only violations within the requisite two years time period were the violations being disclosed, which comprised all of Steeltech's reporting obligations for those two years. Steeltech apparently contends that the violations being disclosed should not be counted as establishing a history of violations relevant to this adjustment factor. This, however, would allow Steeltech to benefit from a delay in meeting its reporting obligations covering two reporting years. We agree with the Region that it would be absurd under the circumstances of this case for Steeltech to be treated with respect to the 1992 and 1993 violations as if it had a history of full compliance when it clearly was not in compliance during those years and, in fact, complied with EPCRA only once in the five-year period from 1989 through 1993. To the extent that the ERP could be read as leading to a contrary result on the particular facts of this case, we reject such a reading.

We therefore conclude that the Presiding Officer's penalty reduction of only 42%, rather than the full 50% does not represent clear error or an abuse of discretion.

2. *Penalty Reductions for Steeltech's Attitude*

The ERP provides for adjustments to the gravity-based penalty of up to 15% for a respondent's cooperative attitude and up to 15% for a respondent's good faith efforts to comply, for a total "attitude" adjustment of up to 30%. The Presiding Officer determined in this case that Steeltech should receive a penalty reduction for the 1989 and 1990 violations of 20% based on Steeltech's cooperation and good faith efforts to comply with EPCRA. On appeal, Steeltech argues that it should have been granted the full 30%, not just a 20% reduction, and that the reduction should have been granted for all violations, not just the 1989 and 1990 violations.

a. *Reduction of 30%, as Opposed to 20%*

Steeltech argues that the Presiding Officer's rationale for granting only part of the available reduction failed to consider "the circumstances existing at Steeltech in terms of employee turnover and the necessary focus of significant efforts and resources to keep the company out of bankruptcy." Steeltech's Brief at 22. We reject Steeltech's contention that consideration of employee turnover and Steeltech's strained financial condition shows that the Presiding Officer committed clear error or an abuse of discretion when she decided not to grant the full 30% reduction. As noted above, compliance with the EPCRA, or any other environmental or safety regulation, is not limited only to those businesses that are financially strong; compliance with applicable environmental and safety regulations are basic requirements of operating a business in this country. Steeltech's suggestion that its financial difficulties somehow justify its failure to comply with the EPCRA and evidence its positive "attitude" towards compliance is rejected. To the contrary, as discussed above, this argument suggests an inappropriate disregard for compliance; not a positive attitude that should be rewarded.

b. *Reduction for All Violations, as Opposed to a Reduction for Only the 1989 and 1990 Violations*

Steeltech also argues that the attitude-based penalty reduction should have been granted for all violations, rather than just for the 1989 and 1990 reporting year violations. Under the ERP's guidance, Steeltech would not be entitled to a reduction for attitude with respect to the 1992 and 1993 violations because the Presiding Officer had already granted a penalty reduction for voluntary disclosure for the same violations -- the ERP treats the penalty reductions for attitude and voluntary disclosure as "mutually exclusive." ERP at 16. Steeltech, however, argues that it should be granted both reductions in this case because the Presiding Officer questioned the appropriateness of the mutual exclusivity of the two reductions and only determined not to grant both reductions in this case on other grounds, which Steeltech contends were erroneous. Thus, Steeltech argues that if the Presiding Officer had not erred in her penalty rationale, she would have granted both reductions.

The Presiding Officer, while indicating that she found the rationale for mutual exclusivity to be "questionable," went on to state:

> [S]ince in this case, EPA considered Steeltech's mere confirmation of information told to it by the Agency as "voluntary disclosure," for which I have found Steeltech entitled to a 42% reduction as to five counts, I find an additional adjustment based upon attitude as to those Counts unwarranted.

Initial Decision at 19 n. 25. Steeltech argues that these grounds for not granting both the attitude reduction and voluntary disclosure reduction were in error because the Presiding Officer misunderstood the parties' stipulations regarding Steeltech's voluntary disclosure and because the

Presiding Officer did not allow Steeltech an opportunity to supplement the record with further testimony to clarify the Presiding Officer's alleged misunderstanding. Steeltech's Brief at 22-23.[18] We do not need to reach these issues, however, because we disagree with the suggestion that the "voluntary disclosure" reduction and the "attitude" reduction should not be mutually exclusive.

The reason for mutual exclusivity, as stated in the ERP, is that both "attitude" and "voluntary disclosure" "recognize the facility's concern with and action taken toward timely compliance." ERP at 16. That this is so is illustrated by the facts of this case. As discussed above, consideration of the ERP's guidance regarding "voluntary disclosure" resulted in a penalty reduction for the 1992 and 1993 violations taking into account the circumstances of Steeltech's voluntary disclosure of the violations promptly after it discovered them and its prompt correction of the violations, among other circumstances. These same facts and circumstances can also form the basis for an "attitude" adjustment, which takes into account cooperation, good faith efforts to comply and the speed and completeness with which the violator comes into compliance. ERP at 18. Thus, the facts and circumstances that would give rise to reductions under the ERP's guidance for both "voluntary disclosure" and "attitude" overlap in many respects. Because we see no reason for those facts and circumstances to be considered for redundant penalty reductions, we find that it is appropriate for the two categories to be considered "mutually exclusive." Accordingly, we find no clear error or abuse of discretion in the Presiding Officer's decision not to grant Steeltech penalty reductions with respect to the 1992 and 1993 violations

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[18]As noted *supra* note 17, Steeltech filed its Motion to Reopen because Steeltech believed that the Presiding Officer erroneously questioned the spontaneity of Steeltech's voluntary disclosure based upon a misunderstanding of both the parties' stipulations and certain hearing testimony. By its Motion to Reopen, Steeltech sought to have admitted into the record certain testimony which Steeltech stated would show that its disclosures were fully spontaneous. On appeal, Steeltech argues in both the second and third sections of its Brief that the Presiding Officer erred in denying the Motion to Reopen.

for Steeltech's attitude, when she already had reduced those penalties under the rubric of "voluntary disclosure."[19]

3. *Penalty Reductions for Other Factors as Justice May Require*

Steeltech argues that it should have been granted a penalty reduction of 25% under the ERP's guidance with respect to "other factors as justice may require." Steeltech's Brief at 24-28. Steeltech argues that other factors identified in the ERP relevant to this case are "new ownership for history of prior violations" and "lack of control over the violation." *Id*. These arguments, however, must fail.

The ERP's guidance for the so-called "justice" factor is very brief. It merely states that the relevant facts that may give rise to a reduction under this factor may include: "new ownership for history of prior violations, * * * and lack of control over the violation. * * * Use of this reduction is expected to be rare." ERP at 18. We have had occasion to apply the "justice" factor in other cases and have confirmed that it should be used to reduce the penalty "when the other adjustment factors prove insufficient or inappropriate to achieve justice." *In re Spang & Co.*, 6 E.A.D. 226, 249 (EAB 1995). More recently, we have re-emphasized that "the justice factor comes into play only where application of the other adjustment factors has not resulted in a 'fair and just' penalty." *Catalina Yachts*, slip op. at 22, 8 E.A.D. at __.

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[19]Because our determination regarding the appropriateness of the exclusivity of the "attitude" and "voluntary disclosure" reductions is unrelated to the degree of spontaneity of Steeltech's voluntary disclosure, we reject Steeltech's arguments made in both the second and the third sections of its Brief that it should have been granted an opportunity to supplement the record to establish the spontaneity of its disclosures. Such evidence would not change our conclusion that Steeltech should not be granted an "attitude" adjustment when it has already been granted an adjustment of 42% for its "voluntary disclosure."

Here, Steeltech argues that the ERP's brief statement that an adjustment may be appropriate for "new ownership for history of prior violations" means that Steeltech should be entitled to an adjustment in this case. Steeltech argues first that "[v]iolations unknown to [the new owners] had already occurred at the time they took over operations in July of 1990." Steeltech's Brief at 24. This argument, however, ignores the broader context with which the ERP is concerned.

To understand the guidance for "justice factor" adjustments based on "new ownership," it is necessary first to understand the reference to "history of prior violations." One of the other adjustment factors available under the ERP's guidance is an upward adjustment for "history of prior violations." ERP at 16-17. The ERP's guidance provides that a "history of prior violations" may give rise to an upward adjustment in the gravity-based penalty because "[t]he penalty matrix is intended to apply to 'first offenders,'" and "[t]he need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation." ERP at 16; *see also In re Mobil Oil Corp.*, 5 E.A.D. 490, 519 (EAB 1994) (noting that a history of full compliance does not give rise to a downward adjustment because the gravity-based penalties are intended to apply to first time violators) . Thus, it appears that the guidance for adjustments under the so-called "justice factor" recognizes that there may be appropriate circumstances for a company with a history of prior violations to be treated, based on the fact of new ownership, as a first time violator (or to receive a penalty reduction to offset, in whole or part, an increase previously made based on the violation history). In this case, however, because the gravity-based penalties were not increased due to

Steeltech's history of violations,[20] it would be inappropriate to allow an off-setting reduction based on the new ownership.

Steeltech also argues, however, that it should receive a justice factor adjustment on the grounds that it is being held liable and assessed a civil penalty for violations that occurred when Steeltech was controlled by Mr. Farmer. The Presiding Officer concluded that no adjustment was required because Mr. Farmer had entered into an indemnity agreement: "Steeltech and its current owners will not have to pay the penalty for Mr. Farmer's misfeasance." Initial Decision at 20. Although Steeltech seeks to raise questions on appeal regarding Mr. Farmer's ability to honor his indemnification obligations, Steeltech points to no evidence in the record to support its arguments. In addition, while we recognize that there may be circumstances where new, environmentally responsible management should not be burdened by a violation history incurred by a prior management, we do not believe that every change of ownership necessarily should be viewed in this light.[21] Accordingly, we find no error in the Presiding Officer's determination not to grant Steeltech a justice factor penalty adjustment based on "new ownership for history of violations."

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[20] A second context in which violation history may be considered under the ERP is in conjunction with the second 25% downward adjustment made for voluntary disclosure of the violation as a reason not to grant the full amount of the adjustment. ERP at 14-15. In this case, however, the decision not to grant Steeltech the full "voluntary disclosure" reduction was based upon the violations for chemicals used in 1990. The Form Rs disclosing that chemical usage were not due until July 1991 -- a year *after* the new owners took over operations. Because the denial of this reduction was based on this history of violations, no adjustment is needed to avoid injustice in this case.

[21] We are mindful that prospective purchasers may be aware that a firm's history of violations may result in increased penalties in the future, and thereby may make corresponding adjustments in the price to be paid for the firm or push for pre-purchase corrections, thereby resulting in market-based incentives for the old owners to continue compliance even when contemplating a sale.

We also find no error in the determination not to grant Steeltech a justice factor penalty adjustment based on "lack of control over the violations." The Presiding Officer held that "Steeltech's failure to appropriately train Mr. Wells' replacement and transfer corporate duties does not constitute an understandable and/or excusable 'lack of control' over the violations." Initial Decision at 21. Steeltech argues that the Presiding Officer should have taken into account Steeltech's serious financial condition as affecting its control over the violations. Steeltech's Brief at 25. We disagree. As noted above, the existence of financial strain does not relieve a business of its obligation to comply with environmental and safety regulations and, indeed, the possibility of violations occurring as a result of employee turnover during a period of financial strain may be anticipated. We thus find no error in the Presiding Officer's conclusion that such circumstances do not constitute a "lack of control" justifying a penalty adjustment.

Finally, Steeltech argues that it should be granted a justice-factor adjustment due to the more than two-year delay between the initial discovery of the 1989 and 1990 violations and the filing of the Complaint commencing this action. Steeltech argues that, had the Complaint been filed earlier, it would have been able to seek a penalty reduction on the grounds of inability to pay. Steeltech's Brief at 26-28. We do not find a two-and-a-half year delay in filing the Complaint to warrant a penalty adjustment,[22] and we are not persuaded that Steeltech would have been entitled to an "ability to pay" reduction had the Complaint been filed earlier. Steeltech's evidence on its ability to pay consisted entirely of evidence that, at the time of the 1989 and 1990 violations (but not at any

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[22] Steeltech's argument regarding enforcement delay appears to be tied solely to its alleged loss of a claim for an "ability to pay" reduction. (We have already rejected its arguments that its culpability is lower due to EPA's failure to contact Steeltech regarding Steeltech's reporting responsibilities.) There is no suggestion of facts that might give rise to estoppel, and we do not otherwise find a reduction on this ground to be appropriate. *See In re B.J. Carney Indus., Inc.*, CWA Appeal No. 96-2, slip op. at 50 (EAB, June 9, 1997), 7 E.A.D. __ (rejecting argument that enforcement delay estopped EPA's enforcement of violation).

time after the February 12, 1992 inspection), it had annual losses and that, for calendar years 1992 and 1993, it had profits but still had an "accumulated deficit." *Id.* at 26. Such evidence is not sufficient to show a lack of ability to pay: Steeltech had net income in 1992 of $198,085 and net income in 1993 of $138,099, *id.*, totaling approximately five and a half times the amount of the penalty assessed by the Presiding Officer. Moreover, Steeltech does not contend that it has a present inability to pay the penalty.

III. *CONCLUSION*

For the foregoing reasons, we uphold the Presiding Officer's assessment of a civil penalty against Steeltech in the aggregate amount of $61,736 for the nine violations. Steeltech shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA– Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.